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No. 85-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, *et al.*,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Eighth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

JOHN O'B. CLARKE, JR.

HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Petitioners
United Transportation
Union, *et al.*

Date: January 1986

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SUPPLEMENTAL BRIEF FOR PETITIONERS

On December 19, 1985, petitioners United Transportation Union [hereinafter, "UTU"], two of its General Committees of Adjustment[1] and officers associated with those Committees filed a petition with this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review a case which was pending before that court on petitioners' appeal from a judgment and permanent injunction which had been issued by the United States District Court for the Eastern District of Missouri enjoining petitioners and employees they represent from striking the Missouri Pacific Railroad. Several weeks after that petition was filed, the Eighth Circuit issued its decision and judgment in that case, affirming the judgment and injunction from which the appeal had been taken. Petitioners

[1] In their petition, petitioners failed to list the General Committees of Adjustment as petitioners.

UTU, *et al.*, pursuant to Rule 22.6 of the Rules of this Court, respectfully submit this Supplemental Brief to bring that decision to this Court's attention and to address its impact on the petition for a writ of certiorari in this case.

OPINIONS BELOW

On January 15, 1986, the Eighth Circuit entered a Per Curiam decision by a three-judge panel of that court affirming the judgment from which petitioners had appealed; that decision is reproduced as Appendix F to this Supplemental Brief. Although that decision has not been officially reported at this time, the court directed that it be published. The Eighth Circuit also issued a separate judgment which is reproduced as Appendix G to this Brief.

JURISDICTION

Petitioners respectfully submit that the fact that the Eighth Circuit has issued its decision on petitioners' appeal to that court does not affect the jurisdiction of this Court to issue a writ of certiorari to review this case, for 28 U.S.C. § 1254(1) provides that this Court may review a case in the court of appeals by such a writ "before or after rendition of judgment or decree . . . ." Petitioners respectfully submit that their original petition should now be construed as one requesting the issuance of a writ to review the decision and judgment which was issued by the Eighth Circuit in this case on Janaury 15, 1986. This petition is clearly timely since it was filed less than ninety days after the judgment of the Eighth Circuit was entered. 28 U.S.C. § 2101(c).

SUPPLEMENTAL STATEMENT

After noting that petitioners had filed this petition for a writ of certiorari and that this Court was also being asked to issue such a writ to the United States Court of Appeals for the District of Columbia Circuit to review the decision by that court

in the related case of *Brotherhood of Locomotive Engineers v. ICC* [hereinafter, *"BLE v. ICC"*] 761 F.2d 714 (D.C.Cir. 1985), *pets. for cert. pending,* Sup. Ct. Nos. 85-792, *et al.,* the Eighth Circuit stated that it "could hold . . . [its] decision in abeyance during the pendency of the petition [in No. 85-1054], or proceed to issue it now." Appendix F at 6f. The court decided to issue its decision at this time "[f]or whatever assistance it may be to the parties and to the progress of the litigation . . . ." *Id.* The decision which the appellate court issued, petitioners respectfully submit, narrowed the issues [2] and clearly shows that there is a conflict between the circuits on questions of law which are crucial to the rail industry today.

When the Eighth Circuit's case was before the district court, respondents Missouri Pacific Railroad [hereinafter, "Missouri Pacific" or "MOPAC"] and the Missouri-Kansas-Texas Railroad [hereinafter, "MKT" or "KATY"] argued that a strike by petitioners was illegal under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* According to respondents, the dispute at bar arose out of the interpretation or application of existing rules and working conditions—*i.e.,* seniority rights—and, thus, was a "minor dispute" over which a union could not lawfully strike under the Railway Labor Act. *See,* Pet. at 9 n.7; 8th Cir.'s Clerk's Record [hereinafter, "C.R."] at 3-4 (Missouri Pacific Complaint at 3-4). Petitioners challenged the validity of that assertion both factually and legally (*see,* C.R. at 85), but the district court resolved the factual question against petitioners on cross motions for summary judgment and concluded that the threatended strike was in fact over a minor dispute. On appeal, petitioners challenged the right of the district court to make that factual finding on a motion for summary judgment; the Eighth Circuit agreed with petitioners stating that the affidavit which petitioners had submitted "created a factual issue sufficient to preclude summary judgment on the 'minor dispute' ground." Appendix F at 7f.

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[2] As explained below, the court's decision eliminated the "minor dispute" issue relied upon by the district court to support its decision.

That conclusion, the Eighth Circuit added, did not end its inquiry, for the district court had based its injunction upon the alternative ground "that even if the dispute is a major dispute the Norris-LaGuardia Act does not bar a labor injunction in this case." Appendix F at 7f. The court then proceeded to summarize the reasoning given by the district court to sustain its alternative conclusion. First, the appellate court observed, the lower court had concluded that, in view of the express statements by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] that the "[p]rovisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and may be implemented without any other approval" (ICC Decision of October 19, 1983 at 15, Appendix to ICC Petition in 85-792 at 67a), respondent Missouri Pacific was "exempted under § 11341(a) of the Interstate Commerce Act . . ., 49 U.S.C. § 11341(a), from the requirements of the Railway Labor Act . . . with respect to major disputes." Appendix F at 7f. Building upon that conclusion, the district court then "rejected UTU's argument that it remains free to strike over MOPAC's refusal to negotiate about the selection of forces for KATY trains operating on MOPAC lines." *Id.* at 8f. According to the appellate court, "the District Court held that in this case the anti-injunction provisions of the Norris-LaGuardia Act . . . are displaced by the jurisdiction of the ICC under the Interstate Commerce Act." *Id.* That holding, as the Eighth Circuit noted, was premised in part upon the district court's conclusion that: " 'To avoid the stifling effects that such economic power [*i.e.,* a strike to obtain a result which the Missouri Pacific was not free to give] would have on any attempt to consolidate railroad operations, Congress vested the ICC with the authority to resolve such disputes during approval proceedings.' " Appendix F at 9f, *quoting* Appendix C at 28c.

After summarizing the district court's two pronged analysis, the appellate court stated (Appendix F at 10f):

> We agree with the reasoning of the District Court on the alternative ground set forth above and

believe that the court clearly was correct in permanently enjoining appellants from striking, picketing, and engaging in other forms of concerted action over the crew selection issue already decided by the ICC.

IMPACT OF DECISION ON REASONS FOR GRANTING THE WRIT

1. As petitioners explained in their Petition for a writ of certiorari (Pet. at 14-18), this case is inextricably entwined with the District of Columbia Circuit's decision in *BLE v. ICC* which the entire rail industry is asking this Court to review. Indeed, petitioners respectfully submit, the Eighth Circuit's decision highlights this inseparable connection because it shows that the injunction in this case was based upon the ICC's necessity determinations, even though those orders were vacated by the *BLE v. ICC* decision.

In this case, petitioners asserted that the district court had to make a *de novo* determination of necessity under 49 U.S.C. § 11341(a) before it could conclude that the Railway Labor Act must give way to the ICC's orders, but the district court refused to conduct such an inquiry. According to the district court, the ICC had "twice made it clear that MOPAC and KATY are exempt from any requirements of the [Railway Labor Act] . . . concerning the crew selection clause in the approved trackage rights agreement." Appendix C at 19c. Since the Hobbs Administrative Review Act, 28 U.S.C. § 2341, *et seq.*, gave the courts of appeals the exclusive jurisdiction to review those ICC determinations, the court ruled that petitioners could not challenge those determinations in the district court. Appendix C at 20c.

Even though those ICC determinations of necessity were set aside by the District of Columbia Circuit in the *BLE v. ICC* case, and even though the *BLE* court stated that until the ICC had made a valid finding of necessity on remand "the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force" (Appendix to ICC Pet. at 45a), the Eighth Circuit nevertheless upheld the district court's permanent in-

junction in this case. According to the Eighth Circuit, an affirmance of the injunction was appropriate in this case because, due to the recall of its mandate by the District of Columbia Circuit pending action by this Court on the petitions for writs of certiorari to review the *BLE* case, the "ICC orders relied upon by MOPAC and KATY, and by the District Court, are thus still in force." *Id.* at 6f. Surely, this formalistic approach to the underlying basis for the injunction in this case warrants this Court, in the exercise of its supervisory powers over the circuits, to accept jurisdiction in this case to avoid the inconsistent results which have been reached here, even if the petitions in *BLE v. ICC* are denied.

2. Petitioners also submit that their petition should be granted in this case if this Court accepts review of the *BLE v. ICC* case, for this case shows that under the ICC's and MKT's view of the allocation of responsibilities over 49 U.S.C § 11341(a), there is a danger that an ICC order may have the effect of relieving a carrier of its obligations under the Railway Labor Act without a showing of necessity being made in any forum. Respondents MKT and ICC have filed separate petitions with this Court to review the *BLE* case because, in their opinion, the immunity granted by 49 U.S.C. § 11341(a) should be "self-executing"—*i.e.*, the ICC should be required to do no more in its order than identify generally what the parties are authorized to do by that order. ICC Pet. at 11; MKT Petition in No. 85-793 at 13. That approach to Section 11341(a), however, addresses only a part of the problem, because the next question which must be answered is: which tribunal—*i.e.*, the ICC or the federal court called upon to apply that immunity—should determine whether the necessity component of Section 11341(a) has been satisfied in a particular case.

The district court and the Eighth Circuit refused to determine the necessity issue because they concluded that the ICC had already decided that question. Moreover, they implicitly found that the ICC had the jurisdiction to address the necessity issue in this case because they believed that "Congress vested the ICC with the authority to resolve such disputes [*i.e.*, labor disputes] during approval proceedings." Appendix C at 28c;

Appendix F at 9f. This allocation of responsibilities over the necessity determination, according to the district court, was required in this case by the Hobbs Administrative Review Act which gives the courts of appeals the exclusive jurisdiction to review ICC decisions. Appendix C at 20c. However, even though the Eighth Circuit had concluded in *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424, 428 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963), that federal courts have the jurisdiction to make the necessity determination where the ICC's order did not address this point, this case shows that any attempt to claim that the ICC's order did not address this issue will be viewed as an impermissible collateral attack on the ICC's order. *See,* Appendix F at 9f.

If the *BLE v. ICC* and Eighth Circuit cases are not reviewed by this Court concurrently, there is a potential danger that the necessity component of 49 U.S.C. § 11341(a) will be eliminated for all practical purposes if the ICC's and MKT's view of the Commission's role under that immunity provision is accepted. According to respondents ICC and MKT, the ICC need not address the question of whether an immunity from the Railway Labor Act is necessary when it approves a transaction such as the trackage rights at bar. But yet, those parties also assert that a district court being called upon to enforce the Railway Labor Act or other employee rights should not make a *de novo* determination of the necessity issue; rather, that court, according to the ICC and MKT, must accept on blind faith the ICC's determination that the crew selection provisions of a trackage rights proposal are "material terms" of the ICC's order which "may be implemented" notwithstanding either the Railway Labor Act or employee contractual rights. ICC Appendix at 67a. Under this view of the separation of functions, no tribunal need ever address the necessity component of Section 11341(a).

3. By concluding that the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, has no impact on the jurisdiction of federal courts to enjoin a labor dispute arising from an "ICC-resolved, consolidation-related" labor issue, the Eighth Circuit has reached a conclusion of law that conflicts with decisions by

this Court on the relationship between that anti-injunction statute and non-labor statutes. *E.g., Order of Railroad Telegraphers v. Chicago & North Western R.R.*, 362 U.S. 330 (1960); *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940); *accord, Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957). That conclusion of law, and the conclusion that the ICC's order relieved the Missouri Pacific of its obligations under the Railway Labor Act to bargain with the UTU over the impact of the MKT's trackage rights on Missouri Pacific employees, are also in direct conflict with the decision by the Fifth Circuit in *Texas & New Orleans R.R. v. Brotherhood of Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963); *see*, Petition at 18-24. These conflicts alone, petitioners respectfully submit, justify granting the petition in this case because, as petitioners explained before (Pet. at 16), a uniform resolution of the issues presented by those conflicts is crucial to the rail industry. Rule 17.1(a) and (c) of the Rules of this Court. Moreover, the manner in which the Eighth Circuit decided this case presents another and equally compelling reason why this petition should be granted.

Petitioners have asserted throughout this case that the right to strike involves several rights—*i.e.*, freedoms of speech and association and the prohibition against involuntary servitude—which are protected by Amendments to the Constitution of the United States. *E.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941). Those rights are not created by any provision of the Railway Labor Act (*e.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378-79 (1969)), but, rather, are merely restrained by that Act in a major dispute case until the parties have exhausted the bargaining processes established by that legislation. Consequently, a finding that the Missouri Pacifc was exempt from the bargaining provisions of the Railway Labor Act does not mean that the strike threat in this case was illegal; it simply means that the restraints which that labor statute placed on the right to strike no longer applied.

Petitioners argued before both the district court and the Eighth Circuit that a finding of unlawfulness had to be made before the strike in this case could be subjected to being enjoined, but both courts disregarded that argument, apparently assuming that the ICC order, having conclusively determined the crew selection issue, made any strike over that dispute illegal. Since the railroads will obviously rely upon the Eighth Circuit's decision in their efforts to use the ICC to change existing working conditions, it is important to rail labor that its right to use its concerted economic power not be foreclosed by a rule of law that improperly restrains employee constitutional rights. Since this case presents this question, petitioners urge this Court to grant their petition if the *BLE v. ICC* case is also to be reviewed.

CONCLUSION

For the reasons set forth herein and in their Petition, petitioners UTU, *et al.*, respectfully request that their Petition be granted if this Court also accepts for review the case in *BLE v. ICC*. Moreover, in light of the fact that the decision by the Eighth Circuit is based upon the ICC orders which were vacated by the District of Columbia Circuit in *BLE v. ICC*, petitioners request that this Court, if it denies the petitions in *BLE v. ICC*, nevertheless grant the Petition in this case and summarily vacate the judgments permanently enjoining petitioners from striking.

Respectfully submitted,

JOHN O'B. CLARKE, JR.

HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Date: January 31, 1986

APPENDIX F

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 84-1465

MISSOURI PACIFIC RAILROAD COMPANY and
MISSOURI-KANSAS-TEXAS RAILROAD CO.,
Appellees,

v.

UNITED TRANSPORTATION UNION; GENERAL COMMITTEE OF ADJUSTMENT; I. NEWCOMB; K. R. GUETHLE; R. D. HOGAN; W. J. SHELTON; RICHARD L. HELMS; T. K. ARTHUR; R. W. BRETCH; R. P. SHOCKLEE; B. J. BENNETT; K. R. MENGES; J. E. QUEATHEM and K. M. DANNEMAN,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri

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Submitted: January 14, 1985
Filed: January 15, 1986

Before BRIGHT, Senior Circuit Judge, ARNOLD and BOWMAN, Circuit Judges.

PER CURIAM.

Appellants (United Transportation Union (UTU), its General Committee of Adjustment, and certain of its agents and officers) ask us to vacate the permanent injunction entered

by the District Court [1] barring them and those in active concert or participation with them from striking, picketing, and other specified actions. The injunction is limited to actions against Missouri Pacific Railroad Company (MOPAC) as a result of the operation of Missouri-Kansas-Texas Railroad Company (KATY) trains over MOPAC tracks under trackage rights granted to KATY by the Interstate Commerce Commission (ICC). We affirm.

The ICC granted KATY the trackage rights in question, over MOPAC's opposition, as a condition of the ICC's approval of the consolidation of MOPAC with Union Pacific Railroad Company. *See Union Pacific Corp.*, 366 I.C.C. 459 (1982), *aff'd sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985). This consolidation was effected in December 1982. Early in January 1983 KATY, using its own employees, began operations over MOPAC tracks in accordance with the ICC's decision.

UTU sought to have MOPAC require KATY to use MOPAC crews in conducting its trackage rights operations. MOPAC took the position that the ICC had given KATY the right to use its own crews in those operations, and therefore that the matter was out of MOPAC's hands. KATY, for its part, entered into agreements with its own UTU employees to operate its trains in the implementation of its trackage rights over MOPAC tracks as authorized by the ICC. By Mailgram dated March 28, 1983, UTU threatened to strike MOPAC beginning April 4, 1983 if arrangements were not made "to halt this trespass on our collectively bargained agreements and our seniority by non-Missouri Pacific employees . . . ." Stipulations, Appendix I.

On March 30, 1983, MOPAC initiated the present litigation by filing its complaint under the Railway Labor Act, 45

[1] The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri.

U.S.C. § 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 11341 *et seq.*, seeking declaratory and injunctive relief against the threatened strike. On the same date, the District Court entered a temporary restraining order prohibiting implementation of UTU's strike threat.

On May 20, 1983, UTU filed counterclaims against MOPAC and KATY, which had intervened as a plaintiff, challenging KATY's use of KATY crews to operate KATY trains in trackage rights service. UTU alleged that KATY's trackage rights operations violated an "actual and objective rule and working condition" governing MOPAC employees, asserting the existence of a requirement that "trains operating over trackage owned by MoPac . . . be manned by MoPac crews." Designated Record at 33, ¶¶ 8, 9. UTU also contended that MOPAC and KATY had violated certain notice and negotiation conditions of the ICC's approval of KATY's trackage rights. Both of these issues, as well as issues raised by MOPAC's complaint, subsequently were presented by UTU directly to the ICC. On June 29, 1983, UTU filed a petition for clarification in which it asked the ICC to rule

> [T]hat its prior orders (1) did not select the forces to perform the trackage rights operations, (2) did not relieve the carriers of their obligations under the Railway Labor Act to avoid unilateral changes of working conditions, and (3) did not relieve the carriers of their obligations to comply with the notice and negotiation provisions of the employee protective provisions imposed in the sub-proceedings at bar to protect the interests of MP employees affected by those transactions.

Missouri Pacific Railroad Co. v. United Transportation Union, 580 F. Supp. 1490, 1497 (E.D. Mo. 1984).

A few months later the ICC issued a decision rejecting all three of UTU's arguments regarding the selection of crews. *See Denver & Rio Grande Western Railroad Co.*, I.C.C. Finance

Docket No. 30,000 (Sub-No. 18 *et al.)* (October 19, 1983) (unpublished), *reprinted in* Brief for Appellants, Appendix I. The ICC held that (a) "trackage rights agreements do not involve a change in UP-MP employees' working conditions," *id.* at 5; (b) MOPAC's employees have "no right to participate in the trackage rights crew selection process," *id.* at 4-5; and (c) pursuant to 49 U.S.C. § 11341, the ICC's approval of KATY's trackage rights applications exempted MOPAC and KATY from any inconsistent requirements of the Railway Labor Act or their collective bargaining agreements, *id.* at 15.

Soon thereafter the parties filed cross-motions for summary judgment. On March 1, 1984, the District Court issued a memorandum opinion, 580 F. Supp. 1490 (E.D. Mo. 1984), explaining in detail the basis for its February 7, 1984 preliminary injunction and granting in part the railroads' motions for summary judgment. The District Court made detailed findings of fact, including a finding that the strike threatened by UTU would cause irreparable injury to MOPAC and to the thousands of shippers it serves. In its conclusions of law, the District Court held that (a) the dispute between MOPAC and UTU is a "minor" dispute within the meaning of the Railway Labor Act, and, therefore, section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, does not bar a labor injunction; (b) alternatively, if this is a "major" dispute within the meaning of the Railway Labor Act, the threatened strike would be illegal because the ICC has exempted the railroads from any duty to negotiate with appellants concerning crew selection for KATY's trackage rights, and section 4 of the Norris-LaGuardia Act must give way to the ICC's power to determine labor disputes in connection with consolidation and trackage rights proceedings; and (c) section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, does not prevent the issuance of a preliminary injunction because plaintiffs have not violated its provisions. 580 F. Supp. at 1499-1506.

On March 30, 1984, the District Court entered its permanent injunction against the threatened strike, and issued an

accompanying memorandum which, *inter alia*, denied UTU's motion to exclude from the scope of the injunction the individual union members. D.R. at 139-45.

Meanwhile, UTU and another union, the Brotherhood of Locomotive Engineers, petitioned the United States Court of Appeals for the District of Columbia Circuit to vacate the ICC orders granting KATY the right to use its own crews in trackage rights service and exempting under 49 U.S.C. § 11341(a) these crew selection prerogatives from the Railway Labor Act and other laws. On May 3, 1985 (several months after oral argument had been heard on the appeal in the instant case) the District of Columbia Circuit handed down its decision. *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3359 (U.S. Nov. 7, 1985) (No. 85-792). In a two-to-one decision, the D.C. Circuit panel held that the ICC had failed to show that the exemption from the Railway Labor Act respecting crew selection was necessary. Accordingly, the court vacated the ICC orders relied upon by the railroads and left the parties to their Railway Labor Act remedies. A petition for rehearing and suggestions for rehearing en banc were filed, and on July 12, 1985, the D.C. Circuit *sua sponte* amended its opinion so that instead of leaving the parties to their Railway Labor Act remedies the court remanded the case to the ICC, giving the ICC the opportunity to exercise its exemption authority by explaining "why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction." *Id.* at 725. The opinion thus having been amended, the petition for rehearing and suggestions for rehearing en banc were denied on August 9, 1985.

The ICC then petitioned the Supreme Court for a writ of certiorari; the Court has not yet ruled on the petition, and the D.C. Circuit, which first stayed its mandate and then eventually issued it on November 12, 1985, recalled its mandate on November 18, 1985 pending the Supreme Court's action. The

ICC orders relied upon by MOPAC and KATY, and by the District Court, are thus still in force.

On December 23, 1985, appellants filed a petition for a writ of certiorari requesting the Supreme Court, if it grants review of the D. C. Circuit case, to review the present case before judgment by our Court. The Supreme Court has not yet acted upon this petition. We could hold our decision in abeyance during the pendency of the petition, or proceed to issue it now. For whatever assistance it may be to the parties and to the progress of the litigation, we issue it now.

As the District Court correctly noted, if a dispute is minor and cannot be resolved by the normal grievance procedure, the parties must submit their differences to the National Railroad Adjustment Board, the jurisdiction of which is exclusive. *See Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972). It follows that a strike over minor disputes violates the Railway Labor Act and may be enjoined by a federal district court, notwithstanding the prohibitions of the Norris-LaGuardia Act. *See Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33 (1963); *Chicago and Northwestern Transportation Co. v. United Transportation Union*, 656 F.2d 274, 277 (7th Cir. 1981). On the other hand, the Norris-LaGuardia Act prevents the issuance of an injunction against a railway labor strike over a major dispute, since the Railway Labor Act requires only that the parties negotiate major disputes and "does not provide a process for a final decision like that of the Adjustment Board in a 'minor dispute' case." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 42 n.24 (1957). The District Court further noted correctly that the essential test is whether the dispute "evolv[es] from the bargaining process for a new or altered contract" (major dispute) or whether the dispute is "over the meaning of an existing collective bargaining agreement" (minor dispute). 580 F. Supp. at 1500 (quoting *Chicago and Northwestern Transporation*, 656 F.2d at 277-78). The District Court then relied

upon the strike threat Mailgram from UTU for the conclusion that the instant dispute is a minor rather than a major one. As previously mentioned, UTU's Mailgram demanded a halt to MOPAC's "trespass on our collectively bargained agreements and our seniority." Based thereon, the District Court concluded that the dispute was "reasonably susceptible to resolution by reference to the contracts between the parties." 580 F. Supp. at 1500.

Appellants contend that the District Court's resolution of the "minor dispute" question on motions for summary judgment was inappropriate because there was a factual dispute as to the underlying reasons for the threatened strike. Appellants submitted an affidavit to show that the dispute involved unsuccessful efforts to negotiate modifications to existing working conditions, and thus that the dispute was a major dispute. We agree with appellants that the affidavit created a factual issue sufficient to preclude summary judgment on the "minor dispute" ground. *See* Fed. R. Civ. P. 56(c).

Our conclusion that the District Court erred in ruling the dispute a minor dispute on motions for summary judgment is not, however, the end of the matter, for the court also held, as an alternative basis for its decision, that even if the dispute is a major dispute the Norris-LaGuardia Act does not bar a labor injunction in this case. In a carefully reasoned opinion the District Court held that MOPAC is exempted under § 11341(a) of the Interstate Commerce Act (ICA), 49 U.S.C. § 11341(a), from the requirements of the Railway Labor Act (RLA) with respect to major disputes. We quote from the District Court's opinion:

> RLA § 156 imposes a duty on carriers to negotiate over certain "major" disputes. 45 U.S.C. § 156. It is easy to see why it is necessary that MOPAC be exempted from that duty, insofar as it relates to UTU's demand that MOPAC negotiate over the selection of forces to operate KATY trains on MOPAC lines. There is nothing that UTU/MOPAC

> negotiations could do to change the crew selection provisions approved by the ICC. Under the ICA the ICC has authority to approve the transactions, including trackage rights agreements, between carriers. 49 U.S.C. § 11341 *et seq.* Here the ICC expressly and emphatically stated that "[p]rovisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and *may be implemented without further approval.*" F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983), at 15 (emphasis added). *See Finding of Fact No. 23.* MOPAC cannot unilaterally change a material term of a trackage rights agreement approved by the ICC and therefore MOPAC was immune from any requirement of the RLA to negotiate over such a material term.

580 F. Supp. at 1502-03 (footnote omitted). In addition, the District Court rejected UTU's argument that it remains free to strike over MOPAC's refusal to negotiate about the selection of forces for KATY trains operating on MOPAC lines. To the contrary, the District Court held that in this case the anti-injunction provisions of the Norris-LaGuardia Act (NLGA) are displaced by the jurisdiction of the ICC under the Interstate Commerce Act. The court's essential reasoning is set forth in the following passage from its opinion:

> In the case at bar the ICC authoritatively resolved the question of which employees may operate KATY's trains over MOPAC lines. The NLGA must be accommodated to this exercise of the ICC's power, because allowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

Although it is not for this Court to question the wisdom of Congress' action, in this case it is not difficult to see why Congress intended the NLGA to be inapplicable to ICC-resolved, consolidation-related labor disputes. In the case at bar, UTU and other labor representatives participated in the ICC proceedings. *See Finding of Fact No. 6.* UTU does not contend that it did not have adequate opportunities to object to any provision of the transaction, including the trackage rights agreement, or to seek favorable treatment. UTU either failed to object to the crewing provisions of KATY's trackage rights application or it did object and the ICC rejected its objection. In either case, it is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

Moreover, it is not probable that Congress intended to allow UTU to strike where UTU's objective is to obtain an advantage which MOPAC is now unable to give—the right to operate KATY trains that run over MOPAC lines. If MOPAC gave that right to any of its employees, MOPAC would breach its agreement with KATY and would vary a material term of an agreement approved by the ICC. If UTU obtained its objective by striking, wouldn't KATY employees then be free to strike to obtain the same advantage? To avoid the stifling effects that such economic power would have on any attempt to consolidate railroad operations, Congress vested the ICC with the authority to resolve such disputes during approval proceedings. Affected employees are not left out in the cold, because § 11347 requires

> the ICC to impose employee protective conditions. 49 U.S.C. § 11347. The balance and efficiency which Congress sought to achieve with this scheme would be essentially and materially frustrated if employees were free to strike.

580 F. Supp. at 1505-06 (footnote omitted).

We agree with the reasoning of the District Court on the alternative ground set forth above and believe that the court clearly was correct in permanently enjoining appellants from striking, picketing, and engaging in other forms of concerted action over the crew selection issue already decided by the ICC. We have considered all the arguments raised by appellants and find them to be without merit. Accordingly, we affirm the judgment of the District Court on the basis of that court's well-reasoned opinion.

AFFIRMED.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[TO BE PUBLISHED.]

APPENDIX G

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

[FILED January 15, 1986]

JUDGMENT

No. 84-1465EM

MISSOURI PACIFIC RAILROAD CO., *et al*,
Appellees,

v.

UNITED TRANSPORTATION UNION, *et al*,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri

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This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the district court is affirmed in accordance with the opinion of this Court.

January 15, 1986

A true copy.

ATTEST:

ROBERT D. ST. VRAIN, JR.
Clerk, U.S. Court of Appeals,
Eighth Circuit